76-1513

IN THE

Supreme Court of the United States

SPRING TERM, 1977

ALEXANDER CZARNECKI,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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NOW COMES the Petitioner, ALEXANDER CZARNECKI, by his attorney, NEIL H. FINK, and respectfully Petitions this Honorable Court for a Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit to review the decision of said Court affirming his conviction of conspiracy to use extortion to collect an extension of credit in violation of 18 U.S.C. § 894.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Sixth Circuit was decided and filed April 1, 1977. The Order and Memorandum Opinion of the United States District Court for the Eastern District of Michigan, Churchill, J. were filed on November 19, 1975. These documents are reprinted in full in the Appendix hereto.

JURISDICTION

The Opinion of the United States Court of Appeals for the Sixth Circuit was filed April 1, 1977. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (1).

QUESTIONS PRESENTED

I.

Did the trial court commit reversible error when it denied Petitioner's Motion for a Mistrial after highly prejudicial testimony concerning Petitioner was presented to the jury, such testimony being inadmissible, devastating and resulting in irreparable harm to his right to a fair trial before an unbiased and impartial jury?

II.

In denying Petitioner's Motion for Judgment of Acquittal and proposed jury instruction concerning the statutory element of extension of credit and in giving an instruction which made that element optional instead of mandatory, did the trial court err reversibly?

III.

Where requests for further instruction made by the jury during its deliberation indicate that they could be considering a compromise verdict in which the Petitioner is convicted of one count but acquitted of the other two counts, is the trial court's refusal to give a supplemental instruction requested by the Petitioner forbidding or discouraging compromise reversibly erroneous?

STATEMENT OF FACTS

(Numbers in parentheses refer to pages of Transcript.)

Petitioner ALEXANDER CZARNECKI, Petitions for a Writ of Certiorari from his conviction in the United States District Court for the Eastern District of Michigan and subsequent affirmance by the United States Court of Appeals for the Sixth Circuit, for the offense of conspiracy to use extortionate means in attempting to collect an extension of credit, contrary to 18 USC §894. On February 6, 1976 Mr. Czarnecki was sentenced to three years in prison.

Count I of the three-count Indictment in this cause charged the Defendant with conspiring with unindicted co-conspirators Philip Berryman and Ronald Burnette to use extortionate means in attempting to collect an extension of credit from Edward Aranosian, a gambling debt allegedly owed to the Defendant. The other two counts charged him with the substantive offense of aiding and abetting the use of extortionate means to attempt to collect the alleged extension of credit, contrary to 18 USC §894 and §2, on two different occasions.

Prior to the government's opening statement, the Defendant requested that the Court consider the propriety of the government's expressed intention to introduce evidence from one Luis Salas and other witnesses, that the Defendant had, on another occasion, hired Philip Berryman to use extortionate means to collect a gambling debt owed by Mr. Salas to the Defendant, for the purpose of showing Defendant's intent in the matter charged. The court rejected this contention that such "similar transaction" proof would be improper unless the Defendant admitted the fact that the acts were done, but asserted that they were done innocently, *i.e.*, without criminal intent. (T. 24, 29, 32).

Edward Aranosian testified that he acted as bookmaker for the Defendant, who took weekly wagers from him on various horse races. (T. 50) This relationship continued for several years until some time during 1968, at which point he became indebted to the Defendant for $1,652.00 (T. 52, 86). On October 22, 1969, Mr. Aranosian received a phone call from an unidentified man who said he (Mr. Aranosian) owed $4,000.00. Later that evening while his wife and daughter were home, someone fired through a window in his home. (T. 55-56)

Thereafter he received another call threatening to blow up his house "the next time" unless he paid the debt. During another call the nollowing morning, he was told by the caller, who later identified himself as "Phil Harris", to take the money to "Al." (T. 63, 86).

Mr. Aranosian then called the Defendant. According to the tape recording admitted into evidence, the Defendant told him that Harris had called him earlier seeking money the Defendant owed and the Defendant had given him Aranosian's name. (T. 90). The two, Defendant and Aranosian, then discussed the exact amount owed.

Aranosian spoke several other times by phone with the person identified as Phil Harris and during these conversations additional threats were made by Harris. (T. 91-94) The next day Aranosian took the proceeds of a bank loan to the Defendant's plumbing business site in Detroit and paid the debt. (T. 96-97) The witness testified that he thought that Harris had called back one last time and had acknowledged that he had gotten his money. (T. 98) Aranosian stated that he had been convicted in 1969 of violation of the federal interstate wagering laws and had been sentenced to two years probation.

On cross-examination Aranosian admitted that the Defendant had told him that the Defendant had been "moving [Aranosian's] money", *i.e.*, had not held bets made by Aranosian himself, but had taken the money and placed the bet with a third party. (T. 109)

Mrs. Isabel Aranosian corroborated her husband's testimony that someone had shot through a lindow of their house on October 22, 1969, and that she and her daughter had been home at the time. (T. 110-112)

Luis Salas testified that he had accepted bets from Edward Aranosian, and, on one weekend, from the Defendant (although he was unable to identify Mr. Czarnecki in court.) Through the wagers, Salas became indebted to the Defendant for $3,000.00 and he told the Defendant to get this amount from Aranosian since the latter owed Salas money. (T. 119-121). In October, 1969, Salas received a call from a man who identified himself as Philip Harris who demanded that Salas pay $13,000 to $20,000 supposedly owed to the Defendant and threatened to harm Salas' family if Salas refused to do so. (T. 123) Salas discussed the matter with Aranosian the next day. That night a shot was fired into Salas' house (T. 125) The next day, Harris demanded a $200 payment "to show Al he was doing his job." (T. 126)

Salas thereafter delivered $170 in the manner he was instructed by Harris to employ, to a man in a white jacket at Ten Mile Road and the I-94 expressway (T. 127). Salas then contacted the St. Clair Shores Police who installed a recording device to his telephone. (T. 128). Several calls were recorded on November 2 and 4, 1969, in which Harris threatened Salas unless he paid the debt allegedly owed to the Defendant. (T. 129-133) Subsequently, a second $200 payment was made under the co-operation of police, and arrests were made at that time. (T. 134)

On cross examination the witness testified that he had no idea whther the Defendant was "moving" money to somebody else. (T. 135) Defendant attempted to bring out through the witness that he and the Defendant had attended a meeting at which the Defendant was instructed by apparently powerful third persons not to ask for any debt from him anymore, but the witness asserted his Fifth Amendment privileges as to questions regarding the meeting. (T. 145)

Philip Wayne Berryman, testifying under a grant of immunity, (T. 148) identified himself as the "Phil Harris" in the Aranosian and Salas calls (T. 154, 161). He was, at the time of his testimony incarcerated for conspiracy to commit unarmed robbery and another conviction for first degree murder had recently been reversed on appeal. Berryman testified that the Defendant hired him and Ronald Burnette to collect gambling debts in October of 1969. (T. 151) He told the Defendant that he would put the debtors in the hospital or kill them if necessary in order to collect the amount owed. (T. 152) According to Berryman, he told Aranosian and Salas that he was working for another party to whom the Defendant had "moved their money", but did so only as a part of the

agreement between himself and the Defendant. (T. 172, 176, 178) Berryman was, he testified, to receive fifty percent of the proceeds of his collection efforts, and was, he indicated, so paid. (T. 180-181)

Berryman was asked on direct examination if he had done work for and been paid by the Defendant for matters besides collections. (T. 182) The witness replied affirmatively and shortly thereafter, defense counsel asked that the jury be excused and moved for a mistrial. (T. 182-183) After an extensive colloquy between the trial court and the parties, the motion was denied. (T. 215)

Cross examination of Philip Berryman revealed that he had been in the extortion business for fifteen years and had not worked in legitimate employment since 1967 or 1968. (T. 229) Before Berryman first contacted the Defendant, he had been told by one Milt Largent to go over and help the Defendant collect some debts owed to the Defendant. (T. 249-250) This was done, he admitted, subsequent to a meeting of the "underworld" (about which the witness Salas had refused to testify) at which the Defendant was told not to attempt to collect the debts owed to him. (T. 264-265)

Ronald Burnette testified that Berryman had told him he was working for the Defendant. Burnette met the Defendant in October 1969 when Berryman and the Defendant discussed collections. (T. 280-281) Burnette testified further that he assisted Berryman in threatening Aranosian and Salas so that they would pay debts owed to the Defendant. (T. 284-287)

The other witnesses were various law enforcement officers who examined the bullet holes in the Aranosian and Salas homes, arranged the telephone tape recordings and participated in the arrests. At the completion of the

government's case-in-chief, the Defendant made a motion for acquittal on the ground that there was no evidence presented to prove that there had been an extension of credit as defined by 18 USC §891, 894 (T. 367) The motion was denied. (T. 395) The motion was renewed and taken under advisement after the defense rested. In a Memorandum Opinion dated November 19, 1975, the Trial Court denied the Motion for Judgment of Acquittal.

In respect of the requirement that an "extension of credit" be proved, the Defendant requested an instruction that the jury must find an additional specific agreement to defer payment of the wagering debt to some later date and that extortionate means were used to collect the extended debt to justify a verdict of guilty. (T. 403) The request was denied. (T. 407) Also, Defendant objected to the giving of a "similar acts" instruction, which objection was overruled and the instruction given (T. 407, 431)

During the jury deliberation, on October 10, 1975, at 11:50 a.m. the jury returned to the courtroom to ask the following questions:

1. Are the three counts separate?

2. Can we hear the ground rules for the three counts? (*i.e.*, the relationship between the counts)

3. If charged with Count 1, are Counts 2 and 3 an automatic conviction? (T. 452-453)

The defense stated that it had no quarrel with the explanation given by the Court on these questions but, fearing that the jury was heading toward a compromise verdict, requested that the court give alternative

supplemental instructions: first, to invoke its authority to comment on the evidence and state to the jury that it believed that, although the jury is not bound by the Court's opinion, if the jury believes the government's evidence beyond a reasonable doubt, then the Defendant was guilty of all counts and if the jury did not believe this evidence the Defendant was not guilty of all counts; second, if this request was denied, to give an instruction that the jury should not compromise their verdict. Both requests were denied. (T. 463) The jury resumed deliberations at 1:30 p.m. and at 2:30 p.m. returned a verdict finding the defendant guilty of the first count and not guilty of the second and third counts. (T. 464-465)

ARGUMENT

I

THE TRIAL COURT COMMITTED REVERSIBLE ERROR WHEN IT DENIED PETITIONER'S MOTION FOR A MISTRIAL AFTER HIGHLY PREJUDICIAL TESTIMONY CONCERNING PETITIONER WAS PRESENTED TO THE JURY, SUCH TESTIMONY BEING INADMISSABLE, DEVASTATING AND RESULTING IN IRREPARABLE HARM TO HIS RIGHT TO A FAIR TRIAL BEFORE AN UNBIASED AND IMPARTIAL JURY.

The government called one Phillip W. Berryman to testify during Defendant's trial. Mr. Berryman, an unindicted, alleged co-conspirator, testified under a grant of immunity. During the course of the direct examination by the government, a series of questions were asked of Berryman relating to any prior relationships or employment situations that had existed between Berryman and Defendant.

Q. Mr. Berryman, prior to engaging in the collection effort on Mr. Czarnecki's behalf, had you worked for him before?

A. No.

Q. Did you work for him on anything else besides collections?

A. Yes.

Q. Did you get paid for those efforts?

A. Yes.

Q. By Mr. Czarnecki?

A. Through him, yes. (T. 182)

At this point, Defendant's counsel objected to the line of questioning and moved for a mistrial. After a lengthy discussion between the trial judge, the prosecutor, and Defendant's attorneys, outside of the presence of the jury (T. 183-216), the trial court denied the motion for a mistrial (T. 216). The court expressed a willingne s to give a curative instruction if defense counsel thought that such would not emphasize the matter, but defense counsel decided to forego the instruction. (T. 216)

The devastating effect that this colloquy had upon the jury can be fully appreciated only by considering the witness' admissions as to his criminal livelihood. Prior to trial, Berryman had made the allegation that the Defendant had hired him to commit several arsons. According to the defense counsel's representations during the mistrial discussions, which were not disputed by the government, considerable investigations attempting to verify the allegations had not turned up a single corroborative fact and no prosecution was ever initiated (T. 190). The government's counsel stated that he purposefully stopped after gaining the testimony that Defendant had paid Berryman for other services so as not to open up an uncharged crime. (T. 190-191). The trial court replied that certainly an arson arrangement would not be similar so as to make it admissible on the intent question.

The other important point to be grasped in order to appreciate the irretrievable prejudice caused by the testimony is that Phillip Berryman was admittedly a criminal for hire, capable and willing to commit any illegal act, including murder, to satisfy his employer. He freely admitted that he was ready to kill the individual involved in this case, Edward Aranosian, if he had not paid the money (T. 166). Testifying under immunity in this case, Berryman also admitted that he had previously been convicted of first-degree murder, a charge that had recently been reversed on appeal, and of conspiracy to commit armed robbery (T. 147-148). It was clear that, at least in the context of an extortion attempt, Berryman would employ the most vicious acts of violence and intimidation, including threats against a debtor's children, to achieve his employer's goal (T. 152, 165-166).

Those who heard the witness testify, including the trial judge, understood that Phillip Berryman did no legitimate work, and that the only possible inference to be drawn from the assertion that he had worked for and been paid by the Defendant was that the Defendant had hired Berryman to commit other crimes. (T. 185, 197, 200, 213). The implication which was imprinted directly on the conscious and subsconscious perceptions of the jurors was that the Defendant had probably placed other unnamed individuals' lives in jeopardy by employing Berryman a number of times. Contrary to the traditional concepts of a fair trial, the evidence had the direct effect of influencing the jury to convict the Defendant for reasons other than guilt of the offense charged. *See*, United States v Harris, 331 F2d 185 (4th Cir 1964).

The defense theory at trial was that the Defendant, who had no criminal record, had never hired Berryman for any purpose, legal or not, and there was considerable evidence submitted to support the theory that other

people had hired Berryman to collect the money so that the Defendant could pay debts owed to these people. But this theory was fatally prejudiced by the witness' allegation that Defendant had on a number of unrelated occasions employed Berryman to accomplish other undoubtedly criminal acts. The only function that such evidence could serve was the unquestionably improper one of showing that the Defendant had a propensity to commit other crimes by the same means. *Johnson v United States*, 318 US 189, 63 S Ct 549, 87 L Ed 1164 (1953); *Holt v United States*, 342 F2d 163 (5th Cir 1965). Under these circumstances, the only reasonable conclusion is that the jury was so tainted by the improper revelations that it was thereafter irreparably biased. A curative instruction could not have cleansed this inadmissible and unsubstantiated accusation from the minds of the jurors. The only remedy consistent with the Defendant's right to a fair trial was to begin the trial anew with an impartial jury.

Whether a mistrial motion should be granted is generally a question for the sound discretion of the trial judge. *See*, *Maison v United States*, 203 F2d 904 (6th Cir 1953). However, the basis for the trial judge's decision must satisfy certain legal principles. In *Wade v Hunter*, 336 US 684, 69 S Ct 834, 93 L Ed 974 (1949), the United States Supreme Court, echoing the standards first enunciated in *United States v Perez*, 22 US (9 Wheat) 579 (1824), stated that a mistrial should be declared and a new trial ordered when there is a "manifest necessity" for such an action and when the "ends of public justice would otherwise be defeated." *See also*, *Brock v North Carolina*, 344 US 424, 73 S Ct 349, 97 L Ed 456 (1953), *Gori v United States*, 282 F2d 43 (2d Cir 1960), aff'd, 367 US 364, 81 S Ct 1523, 6 L Ed 2d 901 (1961)

Although the cases have used a wide variety of language, they all conduct a careful consideration of the overall effect of the procedure or evidence that initiates the mistrial issue. The reviewing courts have found the "manifest necessity" to declare a mistrial if the prejudicial effect of the challenged occurrence is so substantial that it cannot be erased from the minds of the jury by a curative instruction. *See*, *United States v Odum*, 377 F2d 853 (5th Cir 1967); *United States v De Dominicis*, 332 F2d 207 (2nd Cir 1964). This standard of review was well stated in *Maestas v United States*, 341 F2d 493 (10th Cir 1965), when the Court of Appeals cautioned:

> However, as an exception to the general rule, where the character of the testimony is such that it will create so strong an impression on the minds of the jurors that they will be unable to disregard it in their consideration of the case, although admonished to do so, a mistrial should be ordered, *Id* at 496.

In the present case the trial judge recognized the *Maestas* standard for declaration of a mistrial during the course of the argument on Defendant's mistrial motion the judge states, in response to the government's contention that a curative instruction would be adequate to correct any error:

> The Court: That is what I do nine out of ten times but once in a while a tenth time comes up when I get another reaction. What I have to do is determine is there error, if so, is the error sufficient to deprive him of a fair trial, due process. *Have they been so prejudiced by what they heard that they could find it almost impossible to set it aside*? Does it force the defendant to take the stand? (T. 205) (Emphasis supplied.)

It is Defendant's contention that the trial court, while realizing the applicable standard, erred in failing to apply the standard correctly in light of the substantial and irreparable prejudice done to your Petitioner by the challenged testimony.

In several cases closely analagous to this one courts have reversed convictions based upon the failure of the trial judge to declare a mistrial due to severely prejudicial testimony. In *United States v Jackson*, 418 F2d 786 (6th Cir 1969), the Court reversed the defendant's conviction after the trial court had dismissed one count of a four-count indictment and had instructed the jury to disregard the evidence already presented that related to the dismissed charge. The Court of Appeals held that the evidence that had been presented was too prejudicial to be cured by the trial judge's limiting instruction. *See also, United States v Nemeth*, 430 F2d 704 (6th Cir 1970).

In *United States v Smith*, 403 F2d 74 (6th Cir 1968), the Sixth Circuit reversed for a new trial on a case factually very similar to Defendant's case. The Defendant there was charged with knowingly receiving and concealing a stolen car. A friend of the defendant was called as a witness for the prosecution and was questioned about his part in the charged transaction. The witness testified that the defendant had asked him to attempt to sell the car in question. When questioned as to why the defendant could not sell the car himself, the witness testified that, since the defendant had recently gotten out of prison, potential buyers of the car would not have had confidence in him. The defendant's attorney moved for a mistrial on the basis that the evidence of the defendant's prior incarceration was unduly prejudicial.

The trial judge denied the motion for mistrial choosing instead to give a curative instruction to the jury to disregard the statement. The Court of Appeals, citing *Maestas, supra*, reversed, holding that "the probability that the incompetent evidence affected the outcome of the jury verdict is so strong that it resulted in an unfair trial for the defendant." 403 F2d at 76. The Court reasoned that the cautionary instruction had been ineffective under the facts to cure the prejudice caused by the statement.

The situation in *Smith* is quite similar to that of the present case. In both cases questioning by the prosecution of a witness alleged to be in some way involved in the charged transaction resulted in a prejudicial statement relating to prior criminal activities of the respective defendants. Even though Berryman's statements in the present case did not directly mention prior charges or imprisonment as the statements did in *Smith*, the clear implication of his remarks, an implication readily apparent to the trial judge and attorneys present, was that Defendant had previously been engaged in some form of criminal activity.

In fact, in many respects, the prejudice resulting in the case at bar was even more serious than that in *Smith*. In *Smith*, the incompetent evidence was merely that Smith had a criminal record. There was no mention of what charge resulted in Smith's incarceration or whether that prior charge was similar to the subject matter of the current trial. In the instant case the challenged statement not only alluded to prior criminal activity on the part of the Defendant, but further specifically implied that the criminal activity was the employment of Berryman to accomplish some illegal act, precisely the form of criminal activity charged in the present trial.

It is difficult to see how the jury could be expected to erase from their minds Berryman's testimony when the jury in *Smith* was held to be incapable of ignoring the simple fact that Smith had been in prison. The "manifest necessity" for the declaration of a mistrial in the case at bar was even stronger than the necessity for mistrial found in *Smith*, *supra*. Moreover, the witness' testimony in the instant case was directly responsive to the government's questions. Regardless of the latter's purpose for exposing these prior dealings, it is clear that the inevitable result was to place before the jury the exact information which was, in fact, conveyed.

Several Federal Courts of Appeal have decided cases similar to *Smith* and *Jackson*, *supra*. In *Maestas*, *supra*, the Tenth Circuit reversed a conviction on the grounds that the trial judge failed to grant a mistrial motion after a witness had repeatedly referred during his testimony to the Defendant's prior prison sentence. The Court reasoned that, since evidence of prior criminal activity was inadmissible, the jury had been fatally prejudiced by the repeated statements of the witness.

In *Odum*, *supra*, the Fifth Circuit held that it was plain error for the trial court to fail to grant a mistrial, under Federal Rule of Criminal Procedure 52 (b), after a police officer testified that he had seen the defendant in and out of jail for a year and a half. In *De Dominicis*, *supra*, the Second Circuit reversed the conviction and held that evidence presented at the trial that linked the defendant to a known drug dealer was too prejudicial to be cured by an instruction to the jury. *See also*, *Lawrence v United States*, 357 F2d 434 (10th Cir 1966).

In *Helton v United States*, 221 F2d 338 (5th Cir 1955), the Court held that where the defendant was charged

with illegal acquisition and production of marijuana, testimony by a police officer that the defendant had told the officer he had smoked marijuana off and on for five years was too prejudicial to be cured by a jury instruction. The suggestion of prior criminal activity related in kind to that charged in the trial was found to be grounds for reversal of the conviction.

In *United States v Carney*, 461 F2d 465 (3d Cir 1972), the court reversed after a witness, who had been indicted as a co-conspirator for transportation of forged securities in inter-state commerce, testified during direct examination by the government that the defendant had previously attempted to kill him and his children. The trial court denied a motion for mistrial, instead choosing to give a cautionary instruction. The Third Circuit held that the mistrial should have been granted, stating:

> Blandford's testimony was essential to the case against Mahon. The answer was directly responsive. The testimony would indicate to the jury that Mahon has a malevolent, violent and dangerous character. Even worse, the testimony could be interpreted in no other way than a factual statement by the witness that the defendant had committed serious crimes constituting, as a minimum, attempted multiple homicides. Any possible inference that could be drawn from the answer would be totally unrelated and irrelevant to the charge for which the defendant was being tried. The prejudice to the defendant, if considered at all by the jury, is too obvious to require extended discussion. The testimony was clearly inadmissible. . . . Where, however, potential prejudice is such that there is

> inherent danger that jurors, in determining the issues, may be unable or unwilling to erase from their minds that which has improperly come to their attention, no instructions or admonitions by the trial judge will suffice. The only appropriate remedy in such a situation is to declare a mistrial. *Throckmorton v Holt*, 180 US 552, 21 S Ct 474, 45 L Ed 663 (1901), *Burgett v Texas*, 389 US 109, 88 S Ct 258, 19 L Ed 2d 319 (1967). *Id* at 466-468.

The situation in the case at bar is quite similar to that in *Carney*. Berryman's testimony could only be interpreted as a statement that Defendant had been involved in previous criminal activity unrelated to the present charge. Berryman's answers were also directly responsive to the prosecutor's questions. The prejudice against Defendant resulting from Berryman's answers is as "obvious" as the prejudice shown in *Carney*.

In *United States v Gray*, 468 F2d 257 (5th Cir 1972), the government during cross examination of the defendant in a bank robbery case, asked the defendant the question: "You say your wife was killed. You killed her, didn't you?" The defense counsel objected to this question and moved for a mistrial. The prosecutor responded that he was attempting to attack the defendant's credibility. The trial judge denied the mistrial, but instructed the jury to disregard the question. The Third Circuit reversed, holding that not only was the question itself "grevious plain error" but that the subsequent denial of the mistrial motion compounded the error.

> That the trial judge at the time was aware of the prejudicial dimension of the prosecutor's question,

> and his duty to declare a mistrial by reason of it, is demonstrated by his own statements. He then said:
>
> "*Frankly, this is beyond belief . . . I think it is highly prejudicial. I am going to tell the jury to disregard that question . . . I should declare a mistrial, I think, but I won't . . .* [W]hen you say to a witness '*you killed your wife*', *that is about the strongest thing I have heard in a courtroom in many years*." (Emphasis supplied.)
>
> Wife murder is an atrocious crime, revolting and abhorrent to the conscience of our society. No cautionary instruction could purge the jury's mind and memory of the devastating impact of the question "you say your wife was killed. You killed her, didn't you?" The question irretrievably seared itself into the conscious and subsconscious minds of the jury. The most valiant striving on the part of a conscientious juror to comply with the trial judge's admonition to "strike it from your minds entirely"; "just force it out"; "pay no attention to it whatsoever"; could in the case of some jurors only be an exercise in futility. To hold that the cautionary instruction was an effective detergent which completely laundered out of the jury's mind the impact of the prosecutor's question, is unrealistic and little less than fantasmagoria. A trial judge can "strike" evidence from notes of testimony; it is something else again to "strike" its searing impress from a juror's mind. 468 F2d at 259-260.

The court then went on to overturn the conviction on this basis and on the basis of the further "plain error" of introduction of evidence of the defendant's prior imprisonment. *Id* at 201.

The language of the trial judge in *Gray, supra*, is strikingly similar to statements made by the trial judge in the discussion surrounding Defendant's motion for a mistrial. At one point in the argument the judge stated to the government's counsel:

> The Court: It's important to take up the time right now because I am right on the verge of granting a mistrial, frankly. I was shocked when I heard the question, just shocked, because I thought that if they believe that question, if they believe that question had he worked for him before then they have to believe that the defendant has hired this man to commit crimes before because there just isn't any other way that this man from the record here that you could infer any other kind of work he did. (T. 200).

This language is not only evidence that the judge recognized the devastating effect of Berryman's statements but also that he knew these statements could not be easily removed from the minds of the jurors.

In announcing his decision to continue the trial, the trial judge "indicated that he thought defense counsel should have objected earlier, presumably after the first question." (T. 209-216). Defense counsel explained that he was not sure of the nature of the question at first and that, in any event, the initial answer was not inculpatory (T. 209-210).

Counsel's initial uncertainty is especially understandable in light of the government's announced intention the day before not to go into the arson matter. (T. 215). After this question and answer there were three short questions and three simple affirmative answers. The most prejudicial question was the second one — whether

Berryman had worked for defendant on other matters besides collections. Had counsel been able to accomplish the difficult task of cutting off the flow of testimony before the subsequent harmful revelations were made, perhaps some of the damage could have been prevented.

On the other hand, however, the sight of defense counsel leaping to his feet in protest and preventing the jury from hearing the answer they may believe to be relevant can only emphasize the gravity of the information. The assumption then would be that the Defendant wished to hide what would have been an affirmative answer.

Perhaps more fundamentally, it is palpably unfair to place the burden on the Defendant to keep the government's potentially prejudicial questions in check. First, such a task is impossible in the heat of examination. Second, as was just pointed out, even an instantaneous objction cannot negate that which is already before the jury and may very well have the effect of emphasizing the impropriety. The responsibility for determining whether a line of questions could risk a mistrial is on the person initiating the matter. In a situation like the present one where the prosecutor acknowledged that he could not expose the witness' allegation to the jury directly, he should have utilized a motion *in limine* or given an offer of proof when the matter would or might indirectly communicate the same accusation.

The scope of inquiry in a mistrial motion should be the extent of prejudice caused by the inadmissible evidence, not the timing of an objection, especially when, as in the present case, there is no suggestion that the Defendant was attempting to invite, or harbor, error. Regardless of when or if the defense counsel objects, the fact remains

that the jury has heard the testimony and cannot thereafter be considered a fair and impartial trier of fact. This reasoning is buttressed by cases in which such prejudicial errors were found to be "plain errors" requiring defense objections in order for appellate review, (*Gray, supra*), and by cases in which the reviewing Court found that the trial court erred in failing to declare a mistrial *sua sponte* after introduction of prejudicial testimony (*Jackson, supra.*)

The conclusion of the trial court in the present case could have been applied to bar review in most, if not all, of the cited cases. Yet, the appellate courts did not find that failure of defense counsel to keep the inadmissible testimony from being spoken was grounds for a denial of a mistrial. The reviewing courts instead focused on the right of the defendant to have a fair, impartial trial based only on admissible evidence. The courts have uniformly rejected arguments that the errors resulting from prejudicial testimony like that in the present case were harmless. *See, Kattekos v United States*, 328 US 750, 66 S Ct 1239, 90 L Ed 1557 (1946) and the harmless error discussions in *Carney, supra*, and *Lawrence, supra*. Defendant submits that the previous cases have set the standard of review as the seriousness of the challenged prejudice, not the timing or even the existence of objection.

Although the prosecutor's justification for his questioning was apparently not relied upon by the trial judge, defendant will respond to this also. The government's attorney argued initially that he was justified in asking Berryman about his previous employment and earnings from the Defendant to rebut defense counsel's alleged representation during opening argument denying any prior relationship between the two. (T. 184-185.)

To this argument the trial judge responded:

> If there was not, as much as I hate mistrials, judges hate mistrials, busy dockets, as much as I have to have a mistrial, unless there is something in that opening statement that justified this, I am going to grant it . . . (T. 187)

And, after the government asked to be heard further on the matter, the judge again warned:

> Then you better because I think that you have brought out something that is extremely damaging and it would not be relevant unless they opened it up. (T. 187-188)

A careful examination of the defense opening statement discloses that at no point was the representation made that the Defendant did not know Philip Berryman. (T. 44-48) The only denial made regarding Berryman nd the defendant was that the latter did not hire Berryman or anyone else to extort money. Nothing else stated by defense counsel even remotely approached what the government asserted it was relying upon. Thus, since there was no opening of the door by the defense, the trial judge should have adhered to his admonition and declared a mistrial.

Defendant realizes that deciding on a mistrial motion is one of the most difficult exercises of discretion facing a trial judge. The trial judge denied the mistrial request in the present case only after giving both sides full opportunity to argue their positions, and after he had examined carefully the enormity of the prejudice caused by the questions and witness responses. The context of the testimony, however, reveals a situation in which the law so strongly calls for the grant of a mistrial that even the good faith exercise of discretion by the trial judge cannot make up for the resulting denial of Defendant's

right to a fair trial. The trial judge himself candidly recognized the distinct possibility that his judgment would be overturned.

> I am going to deny the mistrial. I don't think we can start over and have another trial on a matter as complicated as this and then have a perfect trial. What I have said on the record is there. If there is a conviction, the powers that be may disagree with me. I will not change the opinions I had. I explained it on the record as I have. (T. 215-216).

Defendant is not asking for a "perfect" trial, but only a trial that satisfies established standards of fairness and impartiality. The trial court's denial of a mistrial in the present case, thereby allowing the jury to take into consideration the highly prejudicial and inadmissible statements of Berryman, did not meet these standards. Consequently Defendant's conviction should be reversed and the cause remanded for a new trial.

II.

IN DENYING PETITIONER'S MOTION FOR JUDGMENT OF ACQUITTAL AND PROPOSED JURY INSTRUCTION CONCERNING THE STATUTORY ELEMENT OF EXTENSION OF CREDIT AND IN GIVING AN INSTRUCTION WHICH MADE THAT ELEMENT OPTIONAL INSTEAD OF MANDATORY, THE TRIAL COURT ERRED REVERSIBLY.

A. THE TRIAL COURT ERRED IN DENYING PETITIONER'S MOTION FOR JUDGMENT OF ACQUITTAL SINCE THERE WAS INSUFFICIENT EVIDENCE TO WARRANT A FINDING THAT AN "EXTENSION OF CREDIT" HAD BEEN PROVED.

From 1965 to 1968, the Defendant and Edward Aranosian made bets with each other on the outcome of

various events. Aranosian described himself as a bookmaker and the Defendant as a gambler, or bettor (not a bookmaker) concerning these bets. (T. 107-108). The only testimony on the arrangement for payment to the winner was that of Aranosian:

> Q. When you say you were betting him horses, for the purpose of the Court and jury, can you describe in a little more detail how this financial relationship came about and how it operated?
>
> A. I would call him sometimes from Chicago, I would call him and bet on a horse. If the horse won or lost at the end of the week, we would transact the money, whatever. If I owed him I would pay him and if he owed me he would pay me. (T. 50)

After losing several bets on horse races, Aranosian found himself indebted to the Defendant in the amount of $1,652.00. Aranosian failed to settle up his obligation at the time agreed upon. Defendant thereafter made two or three demands for payment but on each occasion Aranosian failed to pay. The Defendant never told Aranosian that a later payment would be acceptable or even acquiesced to the non-payment.

In October, 1969, Aranosian was called and threatened by Philip Berryman, posing as Phil Harris, in an attempt to collect the debt. According to Berryman, this was done at the direction and behest of the defendant.

The Defendant moved for judgment of acquittal at the close of the government's case and again after it had rested without presenting evidence. The Trial Court took the Motion under advisement and then, in an opinion dated November 18, 1975, the Court issued a

Memorandum Opinion denying the motion. The Trial Court rejected the Defendant's definition of "extension of credit" and relied heavily upon its belief that the parties "expressly agreed that they would settle up at an agreed upon time subsequent to the conclusion of the sporting events." (Memo. Opinion, p. 5).

Defendant's contention in this issue is simply that this proof fails to satisfy the required statutory element of 18 USC §894 (a) (1) that there be an "extension of credit" because there was no evidence that the two agreed to defer payment on the debt. Instead, both the Indictment and the government's proof at trial treats a "gambling debt" as synonymous with the term "extension of credit." Indeed, although a debt must be in existence or contemplation in order for a credit extension to occur, the common sense understanding of "extension of credit" requires also that the creditor specifically agree to defer payment by the debtor on the obligation. Allowing a debtor additional time to pay the amount owed is a common contractual arrangement in the commercial world. For a commercial extension to occur, there must be an agreement between the obligor and the obligee supported by consideration in order to allow the former further time for payment of his liabilities.

Title 18 USC §891 (1) defines extension of credit as follows:

> (1) To extend credit means to make or renew any loan, or to enter into any agreement, tacit or express, whereby the repayment or satisfaction of any debt or claim, whether acknowledged or disputed, valid or invalid, and however arising, may or will be deferred.

An "extortionate extension of credit" was further defined by Congress in 18 USC §891 (6):

> [A]ny extension of credit with respect to which it is the understanding of the creditor and the debtor at the time it is made that delay in making repayment or failure to make repayment could result in the use of violence or other criminal means to cause harm to the person, reputation or property of any person.

Black's Law Dictionary defines "Extension" at page 694 in several circumstances:

> "The word 'extension' ordinarily implies the existence of something to be extended;"
>
> "In bankruptcy an extension proposal is an agreement on part of creditors that they will extend time within which their claims are probably to be paid . . . , on terms proposed by debtor and approved by Court.

Likewise, Chapter 12 of the Banking Laws in its Definitions and Rules of Construction, Title 12, Section 1901 (e) states:

> "This term is applied among merchants to signify an agreement made between a debtor and his creditors by which the latter, in order to enable the former, embarrassed in his circumstances, to retrieve his standing, agree to wait for a definite length of time after their several claims become due and payable, before they will demand payment."

These definitions and the cases on the accepted commercial usage of the term "extension of credit" set

forth several requirements which must be met in order to validate commercial credit extension:

> 1. There must be a bilateral agreement to extend the debt.
>
> 2. The debt must be definite and the period of extension must be specific.
>
> 3. The extension agreement, as in all agreements, must be supported by a consideration. An already existing debt is not such consideration.

It is entirely possible that, in enacting 18 USC §891, Congress did not intend to impose all of the technical requirements of law of credit on a criminal prohibition. *Cf*, *United States v Andrino*, 501 F2d 1373, (9th Cir 1974). On the other hand, criminal statutes should generally be interpreted strictly and doubts should be resolved in favor of the accused. In any event, the present case does not require this Court to spell out all of requirements of the term. The question at hand is the broader one of whether an already existing debt concerning which there is no bilateral agreement to defer payment satisfies the "extension of credit" element of the offense defined by 18 USC §894.

The Trial Court's conclusion that there was an express agreement as to defer settling the bets until sometime after the sporting event is clearly erroneous. The testimony of Edward Aranosian, quoted above, can be fairly construed as meaning that the money owed would be transacted directly after the results of the race.

A few cases have construed the element of "extension of credit" under 18 USC §891 under different fact situations. The case primarily relied upon by the Trial

Court was *United States v Briola*, 465 F2d 1018 (10th Cir 1972), *cert denied*, 409 US 1108, which also involved the sufficiency of the evidence with respect to the extension of credit element. Defendant Briola, with his partners, ran a bookmaking operation, which had as a "phone man" Donald Meyer. The betting was handled on a "credit basis." Meyer placed several bets for himself under the name "Wynn Don." Subsequently, he told the defendant of his actions and repaid the amount owed to the partnership. Several months later Meyer repeated the practice and lost $10,000 on a football game. This time Meyer told the partners that Don had left town and would not pay. A meeting was held at which Meyer again asserted that Don was the bettor but that he, Meyer, would take responsibility for payment. Meyer was beaten when he stated that he could get reimbursement when Don returned to town, and arrangements were made for payment of the money by Meyer the next day.

The Court in *Briola* rejected the defendant's contention that the statute was aimed at loansharking and should not be applied to the assumption of responsibility for the payment of a gambling debt. The thrust of the Court's analysis, however, is in finding that Meyer was a "debtor" under the statute and that the time sequence as to the creation of the debt and the beating was immaterial because the series of events constituted a single transaction. 456 F2d at 1021-1022.

Another important factual distinction between *Briola* and the present case lies in the conclusionary statement in *Briola*: "All of these bets were handled on a credit basis." *Id* at 1020. It is this precise question which is at the nub of the present controversy. Unlike the present case, there was specific evidence supporting this fact in *Briola*. This summary treatment is understandable in that

case since it was the *bookmaker* and not the *bettor* who was the creditor. An extension of credit, thus, was a logical occurrence in the transaction.

In the present case, the Defendant is the bettor and it is logical that he would not normally expect to have to extend additional time for the bookmaker to pay off the obligation. The relationship contemplated that the loser would pay up the amount owed as the debt accrued. To the extent that the testimony is ambiguous in this regard, it at least cannot necessarily be interpreted as the Defendant agreeing in advance to extend credit for the length of time the bookmaker required to meet his obligation. The Defendant's inability to collect cannot be transformed into a tacit deferment of payment to attempt to bring this debt within the definitions quoted *supra* in §891.

Defendant does not take the position that the Act is limited to loan sharking activities and does not include gambling transactions. But, to be inculpatory under the statute, the gambling transactions must also include an extension of credit. *United States v Keresty*, 465 F2d 36 (3rd Cir 1972), *cert denied*, 409 US 991, illustrates that is required. There the Court held the evidence to be sufficient where extortion was used to compel the payment of a gambling debt after the obligor disputed the validity of the debt and subsequently the parties agreed that the debtor should pay the defendant a certain amount of cash and a scheme of payment was arranged whereby credit was extended to the balance owed. After these payments were not met, extortion was used. Since part of the payment of the debt was deferred, there was an extension of credit under the statute. Although the government argued that there was an extension of credit with each bet, the Court assumed that the extensions of

credit occurred subsequent to the game. 465 F2d at 39 fn. 6. Thus, in *Keresty*, all three of the commercial requirements listed above to make out a valid credit extension were in evidence. *See also*, *United States v Annerino*, 495 F2d 1159 (7th Cir 1974).

Defendant acknowledges that the trend of the few cases which have considered the scope and meaning of the extension of credit element of §894 favors a rather expansive construction of the term. However, to conclude that the element was satisfied where there is no evidence of a bilateral agreement to defer the debt completely ignores the statutory definition as either: (1) making or renewing a loan, or (2) an agreement whereby the satisfaction of a debt will be deferred. 18 USC §891 (1). Using extortion to collect a gambling debt satisfies neither of these two possibilities.

Moreover, the utilization of §894 under facts such as those in this case distorts the statutory scheme by blurring beyond recognition the distinction between §894 and Hobbs Act extortion, 18 USC §1951. Where there is no deferment to extend an obligation involved, then acts of extortion should be charged under the Hobbs Act rather than twist §894 to fit the facts.

B. THE TRIAL COURT ERRED IN REJECTING PETITIONER'S PROPOSED INSTRUCTION THAT IN ORDER TO SATISFY THE EXTENSION OF CREDIT ELEMENT THEY HAD TO FIND A DEFERMENT OF THE DEBT BY BOTH PARTIES AND INSTEAD IN GIVING AN INSTRUCTION THAT THE JURY HAD TO FIND A CONSPIRACY TO COLLECT A DEBT *OR* AN EXTENSION OF CREDIT.

The Defendant was convicted of Count I of the Indictment which charged him with conspiring to collect an

extension of credit. In spelling out the factual allegations, the Court read the following additional part of that Count:

> It was a part of said conspiracy that the defendant Alexander Czarnecki, would employ Philip Wayne Berryman, an unindicted coconspirator, to collect a gambling debt owed by Edward Aranosian by threatened and actual use of violence and other criminal means, as a means of insuring the collection of debt.
>
> It was a further part of said conspiracy that the defendant, Alexander Czarnecki, would demand payment of the gambling debt from Edward Aranosian. (T. 429)

This language communicated to the jury by implication that they need only determine that extortion was used to collect a debt, without the need to determine that there was an extension of credit. And, if there was any doubt in the juror's minds, the judge made the point clear when he gave them the second of the three elements essential to the conspiracy count.

> Second: That the conspiracy was to *collect a debt or extension of credit* by extortionate means. (T. 432) (Emphasis added.)

The communication to the jury could not have been more explicit: As long as the purpose of the criminal agreement was to collect the gambling debt owed, no extension of credit whatsoever had to have been proven by the government to warrant a guilty verdict. It is important to note that it was under this count, concerning which the element of an extension of credit was made expressly optional that the jury convicted the Defendant, rather than the second and third substantive counts, in which there was at least the instruction that an extension of credit was a necessary element.

The Defendant requested that the following instruction be given:

> [I]f you find that the placing of a bet with Defendant Czarnecki by Aranosian and the failure of Aranosian to defer payment to some later date, that it, on the basis of such an agreed deferment that the extortionate means were used to collect the extended debt. (T. 403)

Certainly the language of the instruction could have been improved to remove ambiguities, but the meaning was clear: In order to convict you must find an extension of credit, which consists of a bilateral deferment of the debt. Defendant maintains that this is the only proper construction of the element in view of the definition given in §891 (1).

But even if this view is rejected in order to give the statute the broadest conceivable scope, the instruction which was given on the Count under which Defendant was convicted did away with the extension of credit element altogether. The jury had only to decide that there was an agreement to use extortion to collect the debt. In view of the very limited and ambiguous amount of evidence concerning the credit aspects of the bet, this instruction lightened considerably the government's burden of proof and the jury acted accordingly and returned a guilty verdict on this Count only. Thus regardless of the propriety of Defendant's argument in Section A of this issue, no case has gone so far as to eliminate entirely the need to prove this statutory element.

Since the trial court improperly instructed the jury on the necessary elements, the Defendant's conviction should be reversed and a new trial granted.

III.

WHERE REQUESTS FOR FURTHER INSTRUCTION MADE BY THE JURY DURING ITS DELIBERATION INDICATE THAT THEY COULD BE CONSIDERING A COMPROMISE VERDICT IN WHICH THE PETITIONER IS CONVICTED OF ONE COUNT BUT ACQUITTED OF THE OTHER TWO COUNTS, THE TRIAL COURT'S REFUSAL TO GIVE A SUPPLEMENTAL INSTRUCTION REQUESTED BY THE DEFENDANT FORBIDDING OR DISCOURAGING COMPROMISE WAS REVERSIBLY ERRONEOUS.

Defendant was charged in the Indictment with, in Count I, knowingly conspiring during the month of October 1969 (up to October 24th) with unindicted co-conspirators Berryman and Burnette to use extortionate means in attempting to collect an extension of credit from Edward Aranosian. Counts II and III charge the Defendant with aiding and abetting the use of extortionate means on October 22 and 23, 1969, respectively, in attempting to collect that extension of credit from Edward Aranosian.

The proofs at trial, considered in the light most favorable to the government, showed one continuous course of conduct, with the substantive offenses which formed the bases of Counts II and III being the collective efforts taken to affect the purpose of the collection agreement which was the basis of Count I. Simply, if inartfully put, the acts which formed the bases of Counts II and III were nothing more than overt acts in furtherance of the conspiracy charged in Count I.

On the second day of jury delibarations, at 11:50 a.m., the jury sent out a note containing three questions.

1. Sir: Are the three Counts separate?

2. Can we hear the ground rules for the three Counts?

3. If charged with Count I, are Counts II and III an automatic conviction? (T. 449, 453)

The trial court instructed the jury that the counts were separate and they had to view independently the respective evidence and to bring in separate verdicts as to each count. (T. 452) The judge instructed further that, because the counts had to be considered separately, a given verdict as to one count was not determinative as to the other two (T. 453-454). The judge then requested that they return to the jury room while he consulted counsel as to the propriety and completeness of his answer.

After the jury had again retired, defense counsel stated that, although he had no quarrel with the instructions given, he had a request that they be instructed alternatively as follows: the court should comment on the evidence to the effect that, although the jury is not bound by the Court's view of the evidence, if the jury believes the government's evidence beyond a reasonable doubt, the Defendant would be guilty of all counts, and if it does not believe it beyond a reasonable doubt, the Defendant would not be guilty of all counts; or to give a supplemental instruction that the jury should not render a compromise verdict. (T. 456-457)

To counsel, the inescapable conclusion from the jury's questions was that they were on a course of compromising the case rather than considering each

count on the evidence presented. This potential must have been in the court's mind since it interposed in the middle of counsel's request that the proposed supplemental instruction was one "not to compromise." (T. 457) The government argued that the court should not attempt to determine whether the jury was embarking on a course of misunderstanding the instructions or of attempting to compromise. (T. 459) In considering what should be done, the court stated:

> Let me ask you this, whether a jury has the right to do it and whether counsel has a right to such an instruction, there is no question the jury has the power to acquit even though they believe somebody is guilty, don't they? (T. 460-461)

And a little later the Court queried:

> Isn't it very possible that a jury could really believe that the defendant is guilty of all three but somehow decides that the circumstances do not merit a three-count conviction and return a verdict of one and not guilty of the other without compromising their principles that tye [sic] found him not guilty beyond a reasonable doubt? (T. 461)

The Court then denied the supplemental instruction request, the jury was sent to lunch and returned to resume deliberations at 1:30 p.m. At 2:30 p.m. they returned a verdict of guilty as to Count I and not guilty as to Counts II and III. (T. 464-465)

Defense counsel's conclusion that one of the motivations for the jury's request could have been that

they were negotiating a compromise verdict is supported by the eventual verdict which certainly does not square with any reasonable appraisal of the evidence.[1]

The trial judge's general instructions and refusal to specify that a compromise is not a legitimate means of resolving a dispute in the deliberations may well have induced unanimity by communicating, to a juror who was previously hesitant to convict, the impression that a compromise as to the three counts would be legally acceptable.

The state of the government's evidence presented at trial makes it doubtful that there was an individual consideration of the elements of each count and give credence to the realistic likelihood that the jury compromised. The defense theory at trial was not to deny the fact that extortionate acts were committed, but to assert that the Defendant neither entered into any agreement contemplating these acts nor induced or assisted them; the extortion was committed at the behest of unnamed individuals to whom Defendant had "moved Aranosian's money" and to whom Defendant then owed Aranosian's losses. The government's evidence contradicting this theory consisted almost solely of the testimony of Phillip Berryman who testified that Defendant hired him, furnished him with information about Aranosian and kept in constant contact with him during his threats to Aranosian.

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[1] Of course, there is no way of knowing exactly what had transpired in the deliberations just before the questions were submitted. But it seems more than likely that some of the jurors believed Defendant guilty and others believed him not guilty and a tradeoff was worked out in which he would be convicted of only one of the three counts. The question then arose whether the latter two counts would be an automatic conviction under the law since the same evidence was used to prove all three. Thus, the jury could well have been asking, in effect, for judicial approval of their bargain.

The verdict that the Defendant conspired to use extortion to collect the debt is inarguably inconsistent, considering the evidence, with the verdicts in the second and third counts that he neither aided, induced, procured, counseled or caused the extortionate acts. There was no evidence whatsoever presented that the Defendant participated in the conspiracy and then disassociated himself altogether from the substantive acts. *Cf, United States v Catalano*, 439 F2d 1100 (2d Cir 1971), *cert denied*, 404 US 838.

In the facts of this case, if the jury concluded that the Defendant met with Berryman and told him Aranosian's name or the amount of the debt he owed, then the Defendant was necessarily guilty of the substantive offenses as well as the conspiracy count. Considering the explanation of aiding and abetting as aiding, inducing, procuring, counseling or causing criminal acts, it was logically impossible for the jury to conclude that the Defendant was guilty of the first but not the other counts. The proof for the three was identical and the differing verdicts as to the three counts are mutually irrenconcilable.

Defendant's argument is not that the inconsistency of the verdict itself compels reversal[2] but that this

[2] Each count of an indictment must be treated as a separate indictment. *Dunn v United States*, 284 US 390, 393, 52 S Ct 189, 76 L Ed 356 (1932). There is support, however, for the proposition that, where there is necessarily an identity of the proof for both a substantive count and a conspiracy count, acquittal on the substantive count would bar conviction for conspiracy. *United States v Isaacs*, 493 F2d 1124, 1152 (7th Cir 1974), *cert denied sub nom, Kerner v United States*, 417 US 976; *United States v Fassoulis*, 445 F2d 14, 18 (2d Cir 1971), *cert denied*, 404 US 858.

inconsistency necessarily means either that they misunderstood the instructions or that they rendered a compromise verdict. Indeed, the potential that one of these alternatives was occurring appears to have been the conclusion of both counsel and the court during the discussion of the proposed defense instruction (T. 459-461).

Regardless of whether a jury has the naked power to resolve their differences as to the Defendant's guilt by giving each side part of what they seek, Defendant contends that he was entitled to an instruction forbidding or cautioning the jury from such a practice when one was requested at a time when there was a significant possibility that the jury was considering a compromise.

The United States Supreme Court in *Stein v New York*, 346 US 156, 73 S Ct 1077, 97 L Ed 1522 (1953), extended such a right to a requesting defendant. *Stein* considered the propriety of submitting the question of whether a confession had been coerced to the jury. The Court concluded that due process was not violated by the submission since there was sufficient other evidence to warrant conviction.[3]

In the course of its analysis, the Court discussed its concern about the possibility that the confession, if part of the jury found them to be involuntary, would nevertheless have served as makeweights in a compromise verdict.

> Perhaps a more serious, practical cause of dissatisfaction is the absence of any assurance that the confessions did not serve as makeweights in a compromise verdict, some jurors accepting

[3] This rule of law has obviously been overruled by this Court in *Jackson v Denno*, 378 US 368, 84 S Ct 1774, 12 L Ed 2d 908 (1964).

> the confessions to overcome lingering doubt of guilt, others rejecting them but finding their doubts satisfied by other evidence, and yet others or perhaps all never reaching a separate and definite conclusion as to the confessions but returning an unanalytical and impressionistic verdict based on all they had heard. *Courts uniformly disapprove compromise verdicts but are without other means than admonitions to ascertain or control the practice. Defendants, when two or more issues are submitted, are entitled to instructions appropriate to discountenance, discourage and forbid such practice*. However, no question is raised in this respect as to the charge in this case. *Id* at 177-178 (Emphasis added).

The only difference between the Court's rule in *Stein* and the present case is that the potential compromise in *Stein* involved different issues in the same charged offense, whereas the potential compromise in the present case involved different counts from the same alleged transaction. Such a difference cannot justify the application of a different legal principle in the present case. Thus since the Defendant requested a judicial admonition to the jury againt compromising, the Court had the duty of giving an instruction discouraging or forbidding this practice.

Although the trial judge has a measure of discretion in the giving of supplemental instructions, he must clearly and accurately state the law and avoid potential confusion and distraction, by matters likely to lead the jury away from the legitimate issues. *United States v Grunewald*, 233 F2d 556 (2d Cir 1956), *rev'd on other grounds*, 353 US 391 (1957). *See also*, *United States v Harris*, 388 F2d 373 (7th Cir 1967); *Cf*, *United States v Bass*, 490 F2d 846 (5th Cir 1974).

Where a jury desires additional instructions and makes explicit its difficulties, the Trial Judge should clear away those difficulties with concrete accuracy; it is no answer to say that the instruction was satisfactory as far as it went or that it should be read in light of the original instructions. *Bollenbach v United States*, 339 US 607, 66 S Ct 402, 90 L Ed 350 (1945); *United States v Peterson*, 513 F2d 1133, 1136 (5th Cir 1975); *Powell v United States*, 347 F2d 156 (9th Cir 1965). It is imperative that the trial court insist that each juror be conscientiously convinced of the defendant's guilt; otherwise, a juror should not join in a verdict just because he or she is in a minority. *Rhodes v United States*, 282 F2d 59 (4th Cir 1960), *cert denied*, 364 US 921.

Where the members of the jury are allowed to exchange their findings on one count for concessions by other jurors on another count, this principle is subverted. A juror is then allowed to abandon his vote of not guilty for the perceived consideration that the defendant will not be punished for the related charged offenses. Such a result, in view of lay person's lack of understanding of the practicalities of sentencing, could serve a juror's rough sense of justice without compelling further wrangling among his fellow jurors.

Supplemental instructions are relied upon more heavily than any other portion of the charge; therefore, when the jury requests instruction on points favorable to the government, the trial judge should repeat instructions favorable to the Defendant in order to avoid leaving an erroneous impression in the jurors' minds. *United States v Carter*, 491 F2d 625 (5th Cir 1974). When, as in this case, a jury appears to have rendered an inconsistent verdict as to different counts, both the trial court and the reviewing court should be extraordinarily careful to

scrutinize the record to ascertain any prejudicial error. *Manley v United States*, 238 F2d 221 (6th Cir 1957). Here the trial judge had an obligation to take steps to avoid any possibility of an "unanalytical and impressionistic verdict" in which conscientious decisions were bartered away.

A refusal to take steps to prevent a jury from rendering a compromise verdict on multiple counts is not unlike the situation in which the trial judge replies to a jury request as to whether they can recommend leniency by stating that such a recommendation could be made as part of the jury's verdict. The harm in the latter situation, which requires reversal of the conviction, is the significant potential in the instruction causing a compromise verdict. *United States v Patrick*, 494 F2d 1150 (D.C. Cir 1974); *United States v Glick*, 463 F2d 491 (2d Cir 1972); *United States v Davidson*, 367 F2d 60 (Cir 1966); *Rogers v United States*, 422 US 35, 95 S Ct 2091, 45 L Ed 2d 1 (1975).

The United States Supreme Court in *Rogers v United States* recently reasoned that the fact that a guilty verdict is returned shortly after the jury received an inadequate supplemental instruction "strongly suggests that the trial judge' response may have induced unanimity by giving members of the jury who had previously hesitated about reaching a guilty verdict the impression that the recommendation might be an acceptable compromise." 422 US at 40.

The same evil exists when the trial judge gives supplemental instructions, albeit not incorrect in themselves, which are not sufficiently explicit so that the jury understands that arriving at a verdict by a *quid pro quo* method as to the counts charged is not a legitimate exercise of their duty as jurors. There could be no

prejudice to the government from an instruction against compromise, since it would merely amplify the admonition that the determination of guilt or innocence should be based upon an individual consideration of the evidence rather than by some tradeoff procedure.

The government in this case, however, opposed such an instruction for the reason that first, the Court had given a no compromise instruction, and second, that the Court should not attempt to determine whether the jury was compromising by giving a part to the government and a part to the Defendant. (T. 458-459). Of course, it was obvious to everyone at that point that the government would lose absolutely nothing by such a compromise verdict since the sentences, in any case, would be concurrent. This Court's analysis in *Rogers* indicates that the possibility of compromise is enough to justify the giving of a complete and clear instruction against such a procedure.

The position taken by the Trial Judge is that he had answered the jury's question fairly and did not want to further meddle in the deliberations unless they asked whether such a compromise verdict was legitimate. (T. 461-462) Implicit in his remarks was the conclusion that, although the jury had not the right but the power to acquit even though they believed the Defendant to be guilty, interference with their decision making could have had an improper result. (T. 460-461) Defendant believes that the trial judge had a duty to superintend the jury to the extent necessary to insure that they obey their oaths. A brief instruction that they should not compromise by conceding Defendant's guilt on one count in exchange for his innocence on other counts could have had no detrimental effect. Such an instruction discouraging a compromise could only have insured that the ultimate verdict represented their conscientious decision on the facts and the law. *See, Rogers v United States, supra.*

Refusal to give such an instruction at Defendant's request was an error which requires that his conviction be reversed and that a new trial be ordered.

RELIEF REQUESTED

WHEREFORE, the Petitioner ALEXANDER CZARNECKI respectfully prays that this Honorable Court grant his petition for Writ of Certiorari to consider the important legal issues contained herein.

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963-1700

APPENDIX "A"

RELEVANT DOCKET ENTRIES

1973

November 27. Indictment

1975

August 15. Defendant's Motion to Dismiss Indictment

September 2. Motion to Dismiss denied

October 1. Jury trial commences

October 3 Motion for Mistrial heard and denied

October 8. Motion for Judgment of Acquittal made and taken under advisement

October 10. Jury returns a verdict of guilty on Count I and not guilty on Counts 2 and 3

November 20. Motion for judgment of acquittal denied

1976

February 6. Defendant sentenced to three (3) years in prison

February 10. Notice of gappeal

1977

April 1. Opinion filed by United States Court of Appeals for Sixth Circuit Affirming Conviction.

APPENDIX "B"

INDICTMENT

(United States District Court
Eastern District of Michigan,
Southern Division)

United States of America, Plaintiff

v.

Alexander Czarnecki, Defendant

(Criminal No. 4-80830)

(Filed November 27, 1973)

The Grand Jury charges:

COUNT ONE

That from on or about October, 1969, the exact date being unknown to the Grand Jury, and continuously thereafter, up to and including October 24, 1969, in the Eastern District of Michigan, ALEXANDER CZARNECKI, the defendant, knowingly did combine, conspire, confederate, and agree together with the unindicted co-conspirators, Philip Wayne Berryman and Ronald Burnette, and with divers other persons, whose names are to the Grand Jury unknown, to use extortionate means as defined in Section 891, Title 18, United States Code, in attempting to collect an extension of credit from Edward Aranosian; to wit: the defendant conspired to use and conspired to expressly and implicitly threaten the use of violence and other criminal means to cause harm to the person of Edward Aranosian.

2) It was a part of said conspiracy that the defendant, ALEXANDER CZARNECKI, would employ Philip Wayne Berryman, an unindicted co-conspirator, to collect a gambling debt owed by Edward Aranosian by threatened and actual use of violence and other criminal means, as a means of insuring the collection of debt.

3) It was further a part of said conspiracy that the defendant, ALEXANDER CZARNECKI, would demand payment of the gambling debt from Edward Aranosian.

4) It was further a part of said conspiracy that the unindicted co-conspirators, Philip Wayne Berryman and Ronald Burnette, would implicitly and expressly threaten physical injury and death to Edward Aranosian.

All in violation of Section 894, Title 18, United States Code.

COUNT TWO

On or about October 22, 1969, in the Eastern District of Michigan, the defendant, ALEXANDER CZARNECKI, knowingly and willfully used extortionate means, within the meaning of Title 18, United States Code, Section 891, in attempting to collect an extension of credit from Edward Aranosian, to wit: the defendant aided, abetted, induced, procured, and caused the threatened use of violence and other criminal means to cause harm to the person and property of Edward Aranosian.

All in violation of Section 894 and 2, Title 18, United States Code.

COUNT THREE

On or about October 23, 1969, in the Eastern District of Michigan, the defendant, ALEXANDER CZARNECKI, knowingly and willfully used extortionate means, within the meaning of Title 18, United States Code, Section 891, in attempting to collect an extension of credit from Edward Aranosian, to wit: the defendant aided, abetted, induced, procured, and caused the threatened use of violence and other criminal means to cause harm to the person of Edward Aranosian.

All in violation of Sections 894 and 2, Title 18, United States Code.

RALPH B. GUY, JR.
United States Attorney
Eastern District of Michigan

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APPENDIX "C"

ORDER DENYING MOTION FOR JUDGMENT OF ACQUITTAL

(United States District Court
Eastern District of Michigan
Southern Division)

(U.S.A., Plaintiff -v- Czarnecki, Defendant)

(Filed November 20, 1975)

At a session of said court held in the Federal Building and U.S. Courthouse, Detroit, Michigan, on November 19, 1975.

Present: HONORABLE JAMES P. CHURCHILL
United States District Judge.

In accordance with a Memorandum Opinion of the Court issued in this matter on this date;

IT IS HEREBY ORDERED that the defendant's motion for judgmentof acquittal is DENIED.

/s/ James P. Churchill
United States District Judge

APPENDIX "D"

MEMORANDUM OPINION

(United States District Court
Eastern District of Michigan
Southern Division)

(U.S.A., Plaintiff -v- Czarnecki, Defendant)

(Filed November 20, 1975)

The defendant was charged in a three-count indictment. One count charged the defendant with conspiring to use extortionate means to attempt to collect an extension of credit, in violation of Title 18, United States Code, Section 894. The other two counts charged the defendant with using extortionate means to attempt to collect an extension of credit, in violation of Title 18, United States Code, Sections 894 and 2. Upon jury trial the defendant was found guilty of the conspiracy count and not guilty of the two substantive counts.

At the close of the government's case, the defendant moved for a judgment of acquittal on the grounds that the government had not shown that there had been an extension of credit. The Court denied this motion. The defense then rested and renewed the motion for judgment of acquittal. The Court took this motion under advisement.

The trial record discloses that between 1965 and 1968 the defendant and Edward Aranosian at various times made bets with each other on the outcome of sporting

events. The parties would settle up at an agreed upon time subsequent to the conclusion of the sporting events. At some point in 1968 Mr. Aranosian, after losing a number of horse racing bets, found himself indebted to the defendant in the amount of $1,654. It was unclear from the testimony whether or not these bets were all made at one time. In any event, the agreed upon time for payment passed with no payment forthcoming from Mr. Aranosian. Subsequently, the defendant made two or three demands for payment, and on each occasion Mr. Aranosian declined to pay. Mr. Aranosian did not hear from the defendant again. Some time later, Mr. Aranosian was contacted by Philip Wayne Berryman, who demanded payment of the debt. There was evidence to support the finding that the defendant had hired Mr. Berryman to collect this debt. Mr. Berryman made a number of other contacts with Mr. Aranosian, and for purposes of this motion it is sufficient to state that Mr. Berryman at the direction of the defendant used extortionate means to collect the debt.

The defendant asserts that the government produced no evidence at trial from which a jury could have found that there was an "extension of credit" as required by 18 U.S.C. § 894. This section provides in part that:

> "(a) Whoever knowingly participates in any way, or conspires to do so, in the use of any extortionate means
>
> (1) to collect or attempt to collect any extension of credit . . ."

The defendant would have this Court define the term "extension of credit" to include the following elements:

> "1. There must be a bi-lateral agreement to extend the debt.
>
> "2. The debt must be definite and the period of extension must be specific.
>
> "3. The extension agreement, as in all agreements, must be supported by a consideration. An already existing debt is not such consideration."

The government's position is that a debt incurred through a gambling/bookmaking wager is an "extension of credit".

Title II of the Consumer Credit Protection Act, 82 Stat. 159, 18 U.S.C. § 891 et seq. was passed in 1968. The first cases that arose under it dealt with the Act's constitutionality. The Supreme Court in *Perez v. United States*, 402 U.S. 146 (1971), held that the Act was a permissible exercise by Congress of its powers under the Commerce Clause of the Constitution and that the government need not prove in each case that the particular transaction affected interstate commerce. Later cases dealt with the issue of whether the Act applied only where members of organized crime were involved in the transaction. Courts have uniformly held that it is not necessary that the participants in a particular transaction be members of organized crime. *United States v. Andrino*, 501 F 2d 1373 (CA9 1974); *United States v. Annerino*, 495 F 2d 1159 (CA7 1974); *United States v. Largent*, Criminal No. 4-80831 (D.C. E.D.Mi., opinion filed 7/2/74).

Although these cases do not directly deal with the issue presented here, they do indicate that Title II should not be narrowly construed. Many courts have found support for a broad interpretation of the provisions of Title II in the legislative history of the law. The court in *United States v. Andrino*, supra, justified such a reading of Title II by quoting from the conference report on the Senate bill:

> "The full utility of chapter 42 as a weapon in the war on organized crime obviously cannot be assessed until it has been tested in battle . . . [I]t is not, and is not intended to be, a Federal usury law; not does it have anything to do with interest rates as such. It is, rather, a deliberate legislative attack on the economic foundations of organized crime . . . The methods used in the enforcement of [underworld business obligations] are notorious . . . [T]he conferees wish to leave no doubt of the congressional intention that chapter 42 is a weapon to be used with vigor and imagination against every activity of organized crime that falls within its terms. Conf. Rep. No. 1397, 90th Cong., 2d Sess., 2 U.S. Code Cong, & Admin. News p. 2029 (1968)." Supra, 1377.

Only two cases have dealt with the issue presented here — the interpretation of the statutory phrase "extension of credit". In *United States v. Keresty*, 465 F2d 36 (CA3 1972), the defendants argued that the phrase "extension of credit" should be interpreted as extending only to transactions involving "loan sharks". This is a variant of the argument that the Act should be narrowly construed to apply only to transactions where the

participants are members of organized crime, and the court properly rejected the argument. But the court did not hold that a debt incurred through a gambling wager is an "extension of credit" anytime there is not instant payment of the bet after completion of the sporting contest in question. The court found it unnecessary to decide this issue, since there was evidence of an "extension of credit subsequent to the crap game in question in the form of a deferral of payment and the setting up of a repayment plan. *Keresty*, supra, at 39.

In *United States v. Briola*, 465 F2d 1018 (CA10 1972) cert. denied 409 U.S. 1108 (1973), the court had before it a case involving an extension of credit arising out of a gambling debt. The defendant was engaged in a bookmaking operation and hired one Donald Meyer to work as a phone man. Mr. Meyer placed a number of bets with the defendant on various football games using the fictitious name of Wynn Don. Later, Mr. Meyer accepted responsibility for the payment of the debt, and the defendant proceeded to use extortionate means to collect it. The defendant in *Briola* did not argue, as the defendant does here, that for there to be an "extension of credit" a formal loan arrangement must be agreed upon. Rather, he argued that the term "extension of credit" did not cover a situation where an employee is being punished for stealing from his employer. The court held that:

> "The relationship of the use of extortionate means of collecting extension of credit to bookmaking and similar activities was specifically noted in *Perez*. The indebtedness which is now before us is within the Act's ambit." Id. at 1021.

The court in explaining this holding concentrated on rebutting the arguments of the defendant. But by implication the court found that the making of a bet with payment to be made at a time subsequent to the sporting event was an "extension of credit". It is clear that the court impliedly decided this because there was no other basis in the facts on which the court could have found an "extension of credit". The court deemed it sufficient to note that, "all of these bets were handled on a credit basis." Id. at 1020.

The court in *Briola* pointed out that the term "to extend credit" is broadly defined in the Act. 18 U.S.C. § 891 (1) provides that:

> "To extend credit means to make or renew any loan, or to enter into any agreement, tacit or express, whereby the repayment or satisfaction of any debt or claim, whether acknowledged or disputed, valid or invalid, and however arising, may or will be deferred."

Nowhere in this definition did Congress include the elements that the defendant would read into the term "extension of credit". In effect, Congress excluded those elements by providing that a tacit agreement to defer payment was an "extension of credit".

A common sense reading of the term "extension of credit" leads to the same result. When two people bet on a sporting event, the debt comes into being when the event is concluded; and where there is an understanding, either express or tacit, that the loser will not have to pay until some time after the sporting event is concluded, the winner is in effect extending credit. If the stakes are put

in the hands of a stakeholder or there is an agreement that the loser will pay the winner immediately following the event, there would be no extension of credit.

Here, the parties expressly agreed that they would settle up at an agreed upon time subsequent to the conclusion of the sporting events. The defendant did extend credit to Mr. Aranosian.

The government asserts that there would be sufficient evidence to sustain a conviction even if this Court were to hold that there must be an agreement to defer payment subsequent to the bet being made for there to be an "extension of credit". The government alleges that there was evidence that the defendant at one point acquiesced to a proposal of Mr. Aranosian that payment be deferred until after Mr. Aranosian sold a piece of property. There was evidence that Mr. Aranosian made such a proposal. But there was no evidence that the defendant acquiesced to this proposal. Thus, there was insufficient evidence to show that there was a subsequent agreement to defer payment. The agreement to extend credit can only have occurred, and did occur, when the parties made the bets and agreed to settle up at a point in time subsequent to the conclusion of the last sporting event.

The motion for judgment of acquittal will be denied.

/s/ James P. Churchill
United States District Judge

Dated: November 19, 1975.

APPENDIX "E"

OPINION

(United States Court of Appeals
for the Sixth Circuit)

(No. 76-1480)

(Filed April 1, 1977)

Before: CELEBREZZE, PECK and LIVELY, Circuit Judges.

PECK, Circuit Judge. Defendant-appellant was found guilty by a jury of conspiracy to use extortion to collect an extension of credit, in violation of 18 U.S.C. § 894,[1] and was sentenced to three years imprisonment. Appellant was acquitted, however, on two other counts in the indictment, which had charged that he had used and had aided and abetted the use of extortionate means to collect an extension of credit, in violation of 18 U.S.C. §§ 894 and 2. Appellant appeals his conspiracy conviction. We affirm.

I

At trial, one Edward Aranosian testified that, beginning in 1965 and stopping sometime in 1968 or 1969, he made horse bets with appellant. Bets were placed with him

---

[1] 18 U.S.C. § 894 (a):

(a) Whoever knowingly participates in any way, or conspires to do so, in the use of any extortionate means

(1) to collect or attempt to collect any extension of credit, or

(2) to punish any person for the nonrepayment thereof, shall be fined not more than $10,000 or imprisoned not more than 20 years or both.

through the course of the week, and at the end of the week, losses and winnings would be settled up. By late 1968 or early 1969, as a result of losing bets, Aranosian became indebted to appellant in the amount of $1,654.

On October 22, 1969, Aranosian received a telephone call from an unidentified caller, later determined to be one Philip Wayne Berryman, who demanded repayment of a $4,000 debt. After the call, Aranosian learned from his wife and daughter that earlier in the evening, a shot had been fired through the front window of Aranosian's home. That same night, another phone call was received from Berryman, who again demanded the money and threatened to blow up Aranosian's house unless the debt was paid.

On October 23, 1969, Berryman called (this time giving the alias "Phil Harris") and told Aranosian to take the money to "Al." Aranosian then called appellant, and they discussed the exact amount owed. The next day, October 24, 1969, Aranosian took the proceeds of a bank loan to appellant's place of business and paid the debt.

Similar events occurred with respect to one Luis Salas, who had accepted bets from Aranosian and appellant. Salas had become indebted to appellant as a result of lost wagers and had made payments on the debt after receiving threats from Berryman.

Berryman testified at trial under a grant of immunity and admitted that, at the time he was giving his testimony, he was incarcerated on a Michigan State charge of conspiracy to commit unarmed robbery. He also admitted that he had been convicted of first degree murder,

although that conviction had been recently reversed on appeal. Berryman testified that appellant had hired him and Ronald Burnette in October, 1969, to collect gambling debts owed to appellant, and that he had made the threatening phone calls to Aranosian and Salas. Berryman said that he told appellant that once hired to collect the debts owed that he would, if necessary, kill the debtor. Berryman was asked by government counsel if he had done any work for appellant besides collections, and Berryman replied that he had.

At this point in the trial, defense counsel moved for a mistrial. After hearing argument from the attorneys in absence of the jury, the judge denied the motion. The judge did offer to give a curative instruction to the jury concerning the testimony of Berryman as to his other employment by appellant, but defense counsel did not accept the offer.

At the completion of the government's case-in-chief and after the defense rested, appellant moved for acquittal on the ground that there was not sufficient evidence presented to prove that there had been an extension of credit as defined by 18 U.S.C. §§ 891 and 894. The motions were denied. The district court also denied defense requested jury instructions concerning the prerequisites of an extension of credit and the possibility of a compromise verdict.

II

Appellant's main argument on appeal is that the district court committed reversible error when it denied his motion for a mistrial after testimony was given by

Berryman concerning his employment by appellant in work other than collections. The testimony was elicited in the course of direct examination by the government.

> Q. Mr. Berryman, prior to engaging in the collection effort on Mr. Czarnecki's behalf, had you worked for him before?
>
> A. No.
>
> Q. Did you work for him on anything else besides collections?
>
> A. Yes.
>
> Q. Did you get paid for those efforts?
>
> A. Yes.
>
> Q. By Mr. Czarnecki?
>
> A. Through him, yes.

Appellant's contention is that the jury could only infer from this testimony that appellant had hired Berryman to commit other crimes and that such evidence had the direct effect of influencing the jury to convict for reasons other than for guilt of conspiracy to use extortionate means to collect an extension of credit.

We do not agree. The primary defense of appellant at trial was that he had not hired Berryman to extort Aranosian, but that someone else had. Appellant did not dispute the fact that Berryman had used extortionate means against Aranosian. The government thus sought to introduce evidence that Berryman had other employment relations with appellant than those charged as criminal in the present case. The existence of another employment

relationship had probative value with respect to the issue of who, in October, 1969, had hired Berryman to use extortionate means against Aranosian. Because the government did not elicit direct testimony that other associations between appellant and Berryman were of a criminal nature, we conclude that the probative value of the evidence outweighed any prejudicial impact which might arise from such inferences as the jury might draw. Federal Rule of Evidence 403.

In *United States* v. *Splain*, 545 F.2d 1131 (8th Cir. 1976) the Eighth Circuit was presented with a similar problem. The defendant in that case contended that the district court had committed reversible error in refusing to grant a mistrial after the defendant had been prejudiced by a statement given by a government witness in response to an inquiry by the prosecutor about business dealings between the witness and the defendant. As in the present case, the statement in *Splain* would be read as implying that the defendant had been involved in previous crimes. The Eighth Circuit rejected the defendant's argument that the rule against introducing evidence of other crimes was applicable and concluded that the contested statement was not more prejudicial to the defendant than probative of issues at trial. That court also noted that the potential taint from the contested statement could have been cured by a cautionary instruction, which defendant in that case had (as here) refused.

In the present case, the jury could have inferred from Berryman's bad character that appellant's other associations with Berryman were criminal in nature. As in

Splain, however, the prejudicial effects from inferences suggested by Berryman's testimony could have been cured by cautionary instruction, which appellant refused, and did not present a situation, as in *Maestas* v. *United States*, 341 F.2d 493 (10th Cir. 1965), of prejudice so great as not to be erasable from the minds of the jurors.

Even if we were to accept appellant's argument that Berryman's testimony amounted to evidence that appellant had hired Berryman to commit other crimes, we would still conclude that the evidence was admissible under Federal Rule of Evidence 404 (b). The Rule states:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.

The district court judge, in the exercise of his discretion, could admit the evidence as probative of the identity of Berryman's employer when Berryman was hired to extort collection from Aranosian.

We are mindful that before the enactment of Federal Rule of Evidence 404 (b), evidence of other crimes or bad acts generally had to be substantially similar and near in time to the offense charged, had to be in issue, and had to have more probative value than prejudicial impact. *United States* v. *Ring*, 513 F.2d 1001, 1004 (6th Cir. 1975). These considerations are still of assistance when interpreting Rule 404 (b), *United States* v. *Largent* and *United States* v. *Higdon*, Nos. 76-1285 and 76-1286 (6th

Cir. December 13, 1976); however it would be contrary to the intended operation of the rule for these considerations to constitute a rigid checklist in every case. The Advisory Committee Note to Rule 404 (b) states that "[n]o mechanical solution is offered" to the question of determining when the rule permits the introduction of evidence of other crimes or bad acts. The district court judge is granted a broad discretion in ruling on the admissibility of evidence under Rule 404 (b). *United States* v. *Bloom*, 538 F.2d 704, 708 (5th Cir. 1976); *United States* v. *Bledsoe*, 531 F2d 888, 891 (8th Cir. 1976); *United States* v. *Moss*, 544 F.2d 954, 960 (8th Cir. 1976). Moreover the legislative history of the rule suggests that there be a greater emphasis on admissibility of such evidence. H.R. Rep. 93-650, 93rd Cong., 2d Sess. 7 (1974), 1974 U.S. Code Cong, & Admin. News 7075, 7081.

Relevant evidence under Rule 404 (b) should, therefore, not always be excluded because it does not qualify under a similarity requirement. *United States* v. *Riggins*, 539 F.2d 682 (9th Cir. 1976). Other bad acts disclosed by evidence would have to be similar only if a basis for the relevance of the evidence is similarity. *United States* v. *Riggins, supra*.

Recent case law under Rule 404 (b) demonstrates that evidence of other bad acts, dissimilar to the offense charged, can be properly admitted. In *United States* v. *Johnson*, 542 F.2d 230 (5th Cir. 1976), the Fifth Circuit, in the process of affirming a conviction for violation of a federal statute forbidding the pointing of a gun at FBI agents in an escape effort, held that evidence of the defendant's felony record and of an arrest warrant issued for the defendant was admissible to show defendant's

motive in resisting arrest. In *United States* v. *Barrett*, 539 F.2d 244 (1st Cir. 1976), the First Circuit, in the process of rejecting a defendant's argument that the district court's admission into evidence of the defendant's knowledge of burglary alarms was prejudicial and irrelevant to the charge of transporting and selling stolen stamps, held that such evidence helped identify defendant as one of the guilty parties. In *United States* v. *Moss*, *supra*, 544 F.2d 954, the Eighth Circuit held that evidence that the defendant, charged with robbery, was in possession of a gun that was unused during the robbery, was admissible as probative of the defendant's intent.

Thus, when reviewing a district court's ruling on the admissibility of evidence under Rule 404 (b), the central question is whether the trial court abused its discretion in determining that the probative value of the evidence outweighed its potential prejudicial effect. *United States* v. *Riggins*, *supra*, 539 F.2d at 684; Federal Rule of Evidence 404 (b), Advisory Committee Note. We conclude that the district court judge did not abuse his discretion in this case.

At trial the main issue was whether appellant was the one who had hired Berryman to use extortionate means against Aranosian to collect an extension of credit. Testimony that appellant had hired Berryman with respect to other work besides collections was probative of that issue, even though it involved an employment relationship dissimilar to the one charged as violative of federal law in the present case. Also, the employment had to have occurred near in time to the October, 1969, extortion effort against Aranosian because Berryman first met appellant in 1969 and had first worked for him in October, 1969. The testimony was not more prejudicial than probative since it could only imply vague notions

that appellant was a party to other mischief, unlike the direct evidence of other bad acts in *United States* v. *Jackson*, 418 F.2d 786 (6th Cir. 1968) (one count of a four count indictment dismissed after the jury had heard evidence as to the dismissed count), and in *United States* v. *Smith*, 403 F.2d 74 (6th Cir. 1968) (the fact of defendant's incarceration presented to the jury). More specific instances of bad acts committed by Berryman while in the employ of appellant would have been necessary to establish the prejudice that would have outweighed the probative value of the contested testimony in this case. See *United States* v. *Barrett*, *supra*, 539 F.2d at 249.

This holding is in harmony with *United States* v. *Wiley*, 534 F.2d 659 (6th Cir. 1976), even putting aside the fact that in *Wiley* the Federal Rules of Evidence were not applicable. In *Wiley*, this Court held that the district court committed reversible error when it admitted into evidence testimony that the defendant dealt in stolen rings with another person, a matter unrelated to the charges against the defendant of mail fraud and conspiracy to commit mail fraud. This Court determined that in *Wiley* the prejudice to the defendant from the information that defendant's relationship with another person was criminal outweighed the need of the government to show the specific nature of that relationship. In the present case, the government avoided showing the specific nature of the relationship between appellant and Berryman so that there would not be a prejudicial impact on the appellant which would outweigh the probative worth of the evidence that appellant had hired Berryman with respect to other matters.

III

Appellant next contends that the district court committed reversible error by denying his motion for judgment of acquittal and proposed jury instruction concerning the statutory element of "extension of credit." He strenuously urges that 18 U.S.C. §894, as a criminal statute, should be read narrowly and that read into the statute should be a strict commercial law understanding of the phrase "extension of credit." Appellant would thus impose on that phrase three requirements: (1) a bilateral agreement to extend the debt, (2) a definite debt and a specific extension period, and (3) consideration supporting the extension agreement. Appellant would have this Court reverse his conviction because the proof did not show the existence of all three requirements and because a jury instruction did not reflect the specific requirement of a bilateral agreement to defer paying a debt.

We do not agree. The gambling relationship between Aranosian and appellant was covered by the phrase "extension of credit" in 18 U.S.C. §894.

Congress had defined in 18 U.S.C. § 891 (1) what it means to extend credit under 18 U.S.C. § 894. 18 U.S.C. § 891 (1) provides that:

> For purposes of this chapter:
>
> (1) To extend credit means to make or renew any loan, or to enter into any agreement, tacit or express, whereby the repayment or satisfaction of any debt or claim, whether acknowledged or disputed, valid or invalid, and however arising, may or will be deferred.

In this definition, Congress excluded the elements that appellant would read into the phrase "extension of credit."

Appellant extended credit to Aranosian within the meaning of 18 U.S.C. § 891 (1). Aranosian and appellant placed bets on horse races. When a horse race was over, a debt was created, one way or the other. The two men expressly agreed that payment would be made at a time after the conclusion of the horse race, and thus appellant agreed to defer payment on a debt. See *United States* v. *Briola*, 465 F.2d 1018 (10th Cir. 1972), *cert. denied*, 409 U.S. 1108, *reh. denied*, 410 U.S. 960 (1973); *United States* v. *Keresty*, 465 F.2d 36 (3d Cir.), *cert. denied*, 409 U.S. 991 (1972). The district court was correct in denying appellant's motion for acquittal.

Appellant's attack on a jury instruction concerning the phrase "extension of credit" is also without merit. First, the alleged error is not properly before this Court because the defense did not preserve its objection under Rule 30, Fed.R.Crim.P. Second, even if the question were before this Court, the record shows that the district court did not instruct the jury in a way that gave the jurors an incorrect impression of what they needed to find for an extension of credit as defined by 18 U.S.C. § 891 (1).

IV

Appellant's last argument concerns three questions that the jury asked on the second day of its deliberations:

> 1. Sir, are the three counts separate?
>
> 2. Can we hear the ground rules for the three counts?
>
> 3. If charged with Count I, are Counts II and III an automatic conviction?

The district court instructed the jury that the counts were separate, that an independent determination had to be

made with respect to each count, and that a verdict on one count was not controlling as to any other count. After the jury had retired, appellant requested that the district court give supplemental instructions forbidding or discouraging compromise verdicts. The district court refused. Appellant charges that the refusal constitutes reversible error.

We do not agree. Appellant does not dispute the correctness of the district court judge's responses to the jury's questions, and we cannot conclude that the jury in the present case was otherwise confused or had any erroneous impressions, as in *United States* v. *Petersen*, 513 F.2d 1133, 1136 (9th Cir. 1975). Thus, there was no abuse of discretion on the part of the district court judge in declining to give any supplemental instructions, *United States* v. *Clark*, 506 F.2d 416, 419 (5th Cir. 1975), *United States* v. *Blazewicz*, 459 F.2d 442, 443 (6th Cir. 1972), especially in view of the judge's concern that additional instructions could have had improper results. Cases that involve misleading instructions given in response to specific questions asked by juries, such as *Bollenbach* v. *United States*, 326 U.S. 607 (1945), are inapposite.

Affirmed.